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RECENT LEGAL LITERATURE

REGULATION OF COMMERCE, UNDER THE FEDERAL CONSTITUTION. By Thomas H. Calvert, Annotator of the Constitution in "Federal Statutes, Annotated." Northport, Long Island, New York: Edward Thompson Co., 1907, pp. xiv, 380.

This work is a careful and intelligent study of the important and timely subject indicated in the title. It is based upon a comprehensive study of the cases dealing with the matter, decided by the Supreme Court of the United States, and of many cases decided by state courts of last resort. The discussion is almost wholly devoid of the polemical, and is analytical rather than synthetic. The author's purpose seems fairly indicated by the following excerpt from his preface: "In the preparation of such a work as this an author is under the temptation unduly to dwell on matters of contemporary interest, and thus to lose the sense of due proportion. * * * The construction, scope and effect of statutes passed in exercise of the power of Congress to regulate commerce have not been discussed unless it seemed that a fundamental question was involved in the particular consideration." It might be added that the author's study of his material, exhaustive though it has been, has not resulted in the statement of conclusions as to whether the courts are leading us in their construction of those clauses in the Constitution of the United States relating to interstate commerce. In other words the author has in the main avoided expression of his own opinion as to the soundness of the interpretations by the courts of the commerce clauses and of the acts of Congress claimed to have been enacted in pursuance thereof. While one might wish that Mr. Calvert had expressed more freely the views which his unquestionably profound study of the cases must have given him, still his book is to be judged from the point of view of his frankly avowed purpose as shown above; and so judged, little but praise is to be accorded to it. The organization of the material is good, the outline logical, and the analysis of the cases clear and generally accurate. The author frequently supports his assertion by what upon examination prove to be mere dicta from Supreme Court decisions, but that is perhaps unavoidable, and as it is a practice which the Supreme Court itself constantly resorts to, it should not be criticised, when done with the intelligence, and discrimination which Mr. Calvert has exercised.

Mr. Calvert does promise to himself and the reader one dip into the realm of the controversial. In his preface (p. iii) he says: "On the moot question of the existence and nature of a federal police power I have endeavored to find and state a general principle." In a general way the discussion of this question may be said to run through the entire book, but it is particularly treated in pages 51 to 143. The answer seems to be not plainly given but the Supreme Court cases bearing on the matter have been very clearly analyzed in the pages above indicated and the author's view, though somewhat indefinite, may be fairly presented as follows: The orthodox view is indicated by excerpts from two well-known decisions: "The power of the state to impose

restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive."¹ "It is undoubtedly true that the police power is not by the Constitution delegated to Congress. It may, therefore, under Article X of the Amendments, be regarded as reserved to the states respectively, or to the people."² Concerning which Mr. Calvert says (p. 52): "In making these remarks, the learned justices must have had reference to what have hitherto been understood as strictly police or local regulations. But, inasmuch as even the state police power cannot be exerted, so as to impede the operations of that commerce which is within the exclusive control of Congress, some of the recent instances of the exercise of the federal power indicate the existence of a power over interstate and foreign transactions which is similar to or parallel with that which is exerted by the states with respect to their domestic or local affairs, and which is understood as the state police power." The author thinks that the line of demarcation between the exercise of power which is or necessarily results in the federal exertion of a police power, but which is justified as a regulation of foreign or interstate commerce, and the exercise of similar power which cannot be so justified, is or should be that indicated by the remark of Chief Justice FULLER in *United States v. E. C. Knight Co.*,³ that "commerce succeeds to manufacture" and that federal regulation cannot attach to the latter. That the Supreme Court is disposed to sustain legislation, which at least in effect and indirectly affects manufacture, cannot of course be doubted in view of the deliberate utterances of the court in such cases as *Addyston Pipe, etc., Co. v. U. S.*⁴ and *Northern Securities Co. v. U. S.*⁵ In the latter case, for example, Mr. Justice HARLAN said: "Although the Act of Congress, known as the Anti-Trust Act, has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination, etc., * * * in restraint of trade or commerce among the several states or with foreign nations. * * * Combinations even among private manufacturers or dealers, whereby interstate or international commerce is restrained are equally embraced by the act." Mr. Calvert's view of this subject is stated as follows: "The power of Congress in some measure indirectly to regulate production and manufacture must be conceded. By denying the facilities of interstate transportation in the case of commodities which have not been manufactured under federal supervision, this object may be attained. * * * But there must be some limit, some line of demarcation between the power of Congress and of the states, in controlling the process of manufacture beyond which Congress cannot step. * * * But if under the guise of its power to regulate interstate and foreign

¹ FULLER, C. J., in *In re Rahrer* (1891), 140 U. S. 545.

² BREWER, J., dissenting in *Austin v. Tennessee* (1900), 179 U. S. 343.

³ 156 U. S. 1.

⁴ 175 U. S. 211.

⁵ 193 U. S. 197.

transportation, Congress were to attempt to control the processes of production and manufacture with the avowed or ostensible purpose of regulating matters which are of domestic or local concern, and with no federal policy to be promoted, it must be that the line, faint though it be, which marks the boundary of federal and state power, would seemingly be overstepped,* * * It may be * * * that Congress can prohibit the transportation of articles which have not been produced under conditions guaranteeing their purity and fitness for consumption. * * * Here there would be an element of the federal policy—a national guaranty of the quality of the article. But federal laws regulating the hours of labor and prohibiting the employment of children, and making a conformity to those laws a condition to the interstate transportation of the goods manufactured * * * can have no relation to anything more than matters of mere local concern, as it is difficult to see how such regulations can be embraced by any conceivable rule of commerce, or how they can be considered such police regulations as would serve any distinctively federal purpose." (pp. 115-117).

On another moot point, the author says: "The emphatic and repeated declarations of the United States Supreme Court, * * * that insurance is not commerce would seem to preclude further inquiry. All the cases, however, arose on state statutes. * * * If * * * the subject of insurance may be said to be embraced by the term commerce, as generally defined, as understood by economists, or as colloquially used, the courts would probably be constrained to accept the legislative declaration that insurance is commerce, and to permit the operation of federal legislation on interstate and foreign insurance transactions. It is not easily perceivable, however, how Congress can constitutionally legislate on the subject, except indirectly, as by denying mail and interstate transportation facilities to a company which is not complying with the regulations prescribed by or under the authority of Congress." (p. 247). This it may be observed is precisely the method of regulation recommended to the American Bar Association by its committee on insurance, at the annual meeting for 1907.

Enough has thus been quoted to show that while Mr. Calvert's work is largely an analysis of the cases, it is very much more than a mere digest. It is scholarly analysis, and leads to pretty definite results. The use of the book is facilitated by what seems to be an adequate index. The table of cases shows that the author has used in the neighborhood of eight hundred cases. The book is written in direct, readable style. It is decidedly a work which any student of constitutional law or any lawyer whose practice touches the subject of interstate commerce would find interesting, suggestive and profitable.

H. M. B.

THE FEDERAL POWER OVER CARRIERS AND CORPORATIONS. By E. Parmalee Prentice, of New York. New York: Macmillan Company, 1907, pp. xi, 244.

This book covers substantially the same ground as does Calvert's Regulation of Commerce, reviewed above, but it is written from a very different